Supreme Court, U.S.
FILED

06-628 OCT 30 2006

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

Derrick Ramon Dukes,

Petitioner,

v.

State of Minnesota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *Crawford v. Washington*, which held that the Confrontation Clause requires an opportunity to cross-examine before testimonial hearsay can be admitted against a criminal defendant, apply retroactively to cases on collateral review?

LIST OF PARTIES

The parties to the proceedings below were:

Petitioner Derrick Ramon Dukes is an individual who was the appellant in the Minnesota Supreme Court. Because petitioner is an individual, no disclosures are required by Supreme Court Rule 29.6.

Respondent State of Minnesota was the appellee below.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the highest state court to review the merits is reported as *Derrick Ramon Dukes v. State of Minnesota*, 718 N.W.2d 920 (Minn. 2006); and appears at Appendix A-1 to A-5 to the petition.

STATEMENT OF JURISDICTION

The date on which the highest state court decided the case was August 3, 2006. A copy of that decision appears at Appendix A-1 - A-5. The jurisdiction of this court is invoked under 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The issue presented involves the Petitioner's Sixth Amendment right to confrontation.

STATEMENT OF THE CASE

Petitioner was charged with first degree murder in violation of Minnesota Statute § 609.185. He was tried in Ramsey County District Court and convicted on September 21, 1994. On October 26, 2004, Dukes filed his Second Petition for Post-Conviction Relief pursuant to Minnesota Statute § 590.01. The second petition was denied by Order dated October 21, 2005. Dukes appealed this Order to the Minnesota Supreme Court pursuant to Minnesota Rule of Criminal Procedure 29.02, Subd.1 providing for appeal as of

right to the Minnesota Supreme Court in a first-degree murder case from an adverse final order upon a petition for postconvic relief under Minn. Stat. Ch. 590.

This case arises out of the shooting death of Joe McKinney and the attempted shooting of Bennie Chaney. Both incidents occurred on April 1, 1994, within blocks of each other in St. Paul, Minnesota. This second collateral attack to Dukes' convictions centers on the admission of co-defendant Kevin Lewis' guilty plea. The State offered a plea bargain to Lewis in order to obtain his testimony at the trials of Dukes and a third co-defendant, Steve Morrison. Lewis pled guilty and gave a factual basis for the plea in which he implicated Dukes in the murder. Lewis later withdrew his guilty plea and did not testify in Dukes' trial.

Lewis' withdrawn guilty plea was read to the jury nearly verbatim at Dukes' trial. This testimonial evidence was essential to the prosecution's case giving it facts establishing Dukes' active and knowing participation in the planning and preparation for the crime, the crime's execution, and its cover up.

The prosecutor relied heavily upon Lewis' withdrawn guilty plea in her final argument. Her references to Lewis' testimony included:

- Mr. Lewis said that "they were going to Saint Paul for the purpose of robbing people" (T. 644);[1]
- Lewis, Morrison and Dukes headed to Saint Paul to commit robberies (T. 647);
- Dukes supplied the gun to Lewis (T. 647);
- Dukes supplied the gun and Dukes needed money (T. 648);
- "You heard through Kevin Lewis' plea transcript"

[1] "T" stands for "Trial Transcript."

(stated twice) Dukes' gun, his need for money, their intent to rob (T. 649-50);

- Lewis said Dukes was driving (T. 652);
- "Lewis said through his transcript that 'we knew' meaning Mr. Lewis and the defendant knew 'what Mr. Morrison was going to do when he pulled his gun out. . ." (T. 652);
- Dukes had a choice to follow Morrison or take off, "that's in Mr. Lewis' plea," (T. 654);
- Dukes gave Lewis a semiautomatic (T. 654);
- After McKinney's murder Dukes takes the guns back and cleans them, (T. 655-56); and
- Dukes gave Lewis the gun that killed Joe McKinney (T. 657).

Dukes' previous challenges to his conviction include a direct appeal and a prior petition for post-conviction relief. This challenge ended on January 12, 2004, when this Court declined Dukes' Petition for Writ of Certiorari from the decision of the Minnesota Supreme Court in *Dukes v. State*, 660 N.W.2d 804 (Minn. 2003). *Dukes v. Minnesota*, 124 S.Ct. 1069 (2004).

On March 8, 2004, this Court decided *Crawford v. Washington*, 124 S.Ct. 1354 (2004); holding that prior testimonial evidence is inadmissible in a criminal trial unless the declarant is unavailable and the accused had the opportunity for cross examination. Dukes sought to have *Crawford* applied retroactively. Under *Crawford* the admission of testimonial evidence, a transcript of a codefendant's guilty plea, at Dukes' trial violated his right to confrontation where Dukes never had the opportunity to cross examine this witness.

Putting finality over fundamental fairness and the integrity of the truth finding process, the postconviction court found that *Crawford* did not create a watershed rule of

criminal procedure. The district court relied on the Minnesota Court of Appeals' decision in *Danforth v. State*, 700 N.W.2d 530 (Minn. App. 2005); and ruled that *Crawford* would not be applied retroactively to Dukes' 1994 conviction.

Danforth was subsequently affirmed by the Minnesota Supreme Court. *Danforth v. State*, 718 N.W.2d 451 (Minn. 2006). Finding that Crawford established a new rule of federal constitutional criminal procedure but not one that rose to the level of a "watershed rule," the Minnesota Supreme Court refused to apply Crawford retroactively. In so holding the Minnesota Supreme Court suggested that Crawford's rule requiring that an accused have an opportunity to cross-examine the declarant of any "testimonial evidence" might "actually decrease the likelihood of an accurate determination of guilt or innocence." *Id.* at 460. The Minnesota Supreme Court also found that the Confrontation Clause procedures of *Ohio v. Roberts*, 448 U.S. 56 (1980), which this Court specifically abrogated in Crawford, adequately ensured the fundamental fairness of a trial. *Id.* The Minnesota Supreme Court affirmed the post-conviction court's refusal to apply Crawford retroactively in light of its decision in *Danforth Dukes v. State*, 718 N.W.2d at 922.

REASONS FOR GRANTING THE PETITION

This case merits Supreme Court review for two reasons. First, the Minnesota Supreme Court has decided an important federal question in a way that conflicts with a decision of the United States Court of Appeals for the Ninth Circuit. Second, the Minnesota Supreme Court has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court.

By deciding that *Crawford* did not announce a watershed rule of criminal procedure, the Minnesota Supreme Court decided an important federal question directly contrary

to a prior ruling of the Ninth Circuit Court of Appeals. In *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005)[2]; the Ninth Circuit Court of Appeals ruled that the rule in *Crawford* should be given retroactive application as it is truly a bedrock procedural element. *Bockting's* conviction for sexual abuse became final in 1993. His conviction was largely based on his stepdaughter's police interview. The stepdaughter did not testify at trial. *Bockting* later sought to collaterally attack his conviction under *Crawford*.

The Ninth Circuit was careful to heed this Court's admonition that the class of retroactive "rules is extremely narrow." *Bockting*, 399 F.3d at 1016; citing *Schriro v. Summerlin*, 124 S.Ct. 2519, 2523 (2004). Nonetheless, the Ninth Circuit found that *Crawford's* cross-examination requirement implicated the accuracy of a criminal proceeding and therefore merited retroactive application. *Bockting*, 399 F.3d at 1016-17. The *Bockting* Court noted that *Crawford* announced a rule that implicated the "fundamental fairness and accuracy of the criminal proceedings." *Id.* at 1016-20.

The Ninth Circuit also held that the fact that Confrontation Clause violations are subject to harmless error review has nothing to do with whether *Crawford* announced a watershed rule or not. The watershed rule concept is concerned with the accuracy of a criminal trial while harmless error review concerns the weight of an error. "Accuracy and measurability are different concepts...." *Id.* at 1020. Thus, the Court held, the *Crawford* rule is still a watershed rule though it is subject to harmless error review. *Id.* The *Crawford* rule must be applied retroactively, the Ninth Circuit concluded, as it "is one without which the likelihood of accurate conviction is seriously diminished." *Id.* at 1021; *see also Tidwell v. Calderon*, 134 Fed. Appx. 141 (9th Cir. 2005).

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[2] This Court granted certiorari in *Bockting sub nom Whorton v. Bockting*, 126 S.Ct. 2017, 164 L.Ed.2d 778 (2006).

The Minnesota Supreme Court also decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court. This Court's granting certiorari in *Whorton v. Bockting*, supra; establishes the importance of the question now presented and confirms that this Court should decide whether the rule of *Crawford v. Washington* should be applied retroactively to cases on collateral review. Minnesota courts follow the rulings of the United States Supreme Court in determining whether a new rule of federal constitutional criminal procedure is applied retroactively. *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004). Ordinarily, a defendant whose conviction has already become final when the new rule is announced is not entitled to retroactive application of such new rule. *Id.*; citing *Teague v. Lane*, 489 U.S. 288, 31011, 109 S.Ct. 1060 (1989). There are three steps in applying *Teague* to determine whether a new rule of criminal procedure applies to a case on collateral review:

> First, the court must determine when the defendant's conviction became final. Second, it must ascertain the legal landscape as it then existed, and ask whether the Constitution, as interpreted by precedent then existing, compels the rule. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.

Beard v. Banks, 542 U.S. 406, 411, 124 S.Ct. 2504, 2510 (2004) (internal citations omitted).

Under *Teague*, a new constitutional rule of criminal procedure is applied retroactively to cases on collateral review when the rule (1) "places certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to proscribe," or (2) "requires the

observance of those procedures that ... are implicit in the concept of ordered liberty," i.e. "a watershed rule of criminal procedure that alters `our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.'" *Meemken v. State*, 662 N.W.2d 146, 149 (Minn. App. 2003); citing *Teague*, 489 U.S. at 307, 311 (emphasis in original). A watershed rule is one that improves the accuracy of a trial. *Id.*

The rule announced in *Crawford* falls within the second exception. Subjecting a witness who has given testimonial evidence to cross examination improves the accuracy of any trial and is essential to the fairness of any conviction.

Justice Scalia could not have been any clearer in his *Crawford* opinion: the right to confront one's accusers is a "bedrock procedural guarantee." *Crawford*, 124 S.Ct. 1359. A prior opportunity to cross-examine, this Court recognized, was, historically, a prerequisite to the admissibility of testimonial evidence and dispositive of the evidence's reliability. *Id.* at 1366-67. The Confrontation Clause reflects the judgment that a prior opportunity to cross-examine a witness who has given testimonial evidence is "how reliability can best be determined." *Id.* at 1366-67, 1370. As Justice Byron White succinctly stated; "cross-examination is the 'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970).

Crawford makes clear that an opportunity to cross examine is "the constitutionally prescribed method of assessing reliability." *Id.* In so ruling this Court held that the flexible test of *Ohio v. Roberts*, 448 U. S. 56, 100 S.Ct. 2531 (1980); should not be applied when determining whether to

admit "testimonial" evidence. *Id.* 124 S.Ct. at 1370-71.[3] In doing so, this Court made clear that when it comes to testimonial evidence, there is no substitute for cross examination:

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Id.

This Court has twice before given retroactive application to cases announcing "new rules" under the Confrontation Clause. In *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318 (1968); the Court held that admission of an absent witness' preliminary hearing testimony violated a defendant's right to confrontation unless the State made a good-faith effort to secure the witness' presence. Noting that the inability to cross-examine a witness whose preliminary hearing testimony is admitted at trial may have a "significant effect on the 'integrity of the fact-finding process,' this Court made the *Barber* rule retroactive. *Berger v. California*, 393 U.S. 314, 89 S.Ct. 540 (1969).

In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968); this Court held that admission at a joint trial of a defendant's extra-judicial statement implicating a codefendant violated the codefendant's Sixth Amendment right of cross-examination under the Confrontation Clause. The *Bruton* rule was applied retroactively because the error at issue "'went to the basis of fair hearing and trial because the procedural apparatus never assured the (petitioner) of a fair determination' of his guilt or innocence." *Roberts v. Russell,* 392 U.S. 293, 294, 88 S.Ct. 1921, 1922 (1968).

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[3] "Testimonial" was not precisely defined but includes at a minimum "prior testimony at a preliminary hearing, before a grand jury, or at a former trial." *Crawford*, 124 S.Ct. 1374.

In Mr. Duke's case the Minnesota Supreme Court made a qualitative assessment that *Crawford's* rule does not rise to the level of the rule of *Gideon v. Wainright*, 372 U.S. 335 (1963); (right to counsel fundamental). *Danforth*, 718 N.W.2d at 460. The Crawford decision itself as well as the holdings in *Barber* and *Roberts* demonstrate that such assessment is mistaken. Rather, *Crawford's* rule is, like *Gideon's*, amongst that small group that merit retroactive application. As has been the case with other "new" confrontation clause rules, *Crawford's* rule improves the accuracy of a trial and is essential to the fairness of any conviction.

This Court has not yet ruled whether *Crawford v. Washington* announced a "watershed rule" meriting retroactive application. This is an important federal constitutional question given the hundreds if not thousands of individuals convicted on the basis of non-testimonial hearsay evidence without any opportunity to cross-examine the declarant. Mr. Dukes is one such individual. He respectfully requests that this Court grant his writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: 10/30/2006

Supreme Court of Minnesota

Derrick Ramon **DUKES**, petitioner, Appellant,

v.

STATE of Minnesota, Respondent.

No. A05-2264.

Aug. 3, 2006.

Background: Following final appellate affirmance, 544 N.W.2d 13, of his conviction of first-degree felony murder, attempted first-degree felony murder, and attempted aggravated robbery, of his consecutive sentences of life and 180 months' imprisonment, and of denial, 660 N.W.2d 804, of his first petition for post-conviction relief, petitioner filed second petition for post-conviction relief The District Court, Ramsey County, Salvador Rosas, J., denied petition, and petitioner appealed.

Holding: The Supreme Court, Meyer, J., held that holding of the United States Supreme Court in *Crawford v. Washington*, governing admissibility of out-of-court statements deemed testimonial in nature, was not retroactive to petitioner's case.

Affirmed.

West Headnotes

[1] **Criminal Law 110 1134(6)**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(6) k. Theory and Grounds of Decision in Lower Court. Most Cited Cases

When determining whether there is sufficient evidence to sustain a postconviction court's findings, the reviewing court is not limited to the reasoning of the postconviction court, and can affirm the denial of postconviction relief on grounds other than those on which the postconviction court relied.

[2] Courts 106 100(1)
106 Courts
10611 Establishment, Organization, and Procedure
106II(H) Effect of Reversal or Overruling
106k 100 In General
106k100(1) k. In General; Retroactive or Prospective Operation. Most Cited Cases,

Holding of the United States Supreme Court in *Crawford v. Washington*, governing admissibility of out-of-court statements deemed testimonial in nature, did not announce watershed rule of federal constitutional criminal procedure, and was thus not retroactive to criminal case final at time of such decision.

**921 Syllabus by the Court*

Crawford v. Washington 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), did not announce a watershed rule of federal constitutional criminal procedure and, therefore, the Crawford rule is not retroactive to petitioner's case that was final at the time of the Crawford decision.

Frederick J. Getz, Goetz & Eckland PA, Minneapolis, MN, for Appellant.

Michael Hatch, Attorney General, Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Asst. Ramsey County Attorney, St. Paul, MN, for Respondent.

Considered and decided by the court *en banc* without oral argument.

OPINION

MEYER, Justice.

Derrick Ramon Dukes appeals the denial of his second petition for postconviction relief. The petition alleged Crawford error entitling Dukes to a new trial. We affirm the district court.

Following a jury trial, Dukes was convicted of first-degree felony murder, attempted first-degree felony murder, and attempted aggravated robbery. *State v. Dukes*, 544 N.W.2d 13, 15 (Minn. 1996) (*Dukes I*). The district court sentenced Dukes to consecutive terms of life and 180 months' imprisonment. *Id.* Our opinion issued in response to Dukes' direct appeal provides a full statement of the facts in this case. See *id.* at 15-18. Dukes appealed his convictions and sentences, raising five issues. *Id.* at 15. One of these issues was whether the admission at trial of a transcript of a codefendant's statements made at the codefendant's guilty plea hearing violated Dukes' constitutional right to confrontation. *Id.* at 19. Citing *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), we held the admission of the transcript did not violate Dukes' Sixth Amendment rights and affirmed Dukes' convictions and sentences. *Dukes I*, 544 N.W.2d at 15, 19.

Dukes' first petition for postconviction relief raised six issues; the postconviction court denied the petition after holding an evidentiary hearing. *See Dukes v. State*, 621 N.W.2d 246, 250-51 (Minn. 2001) (*Dukes II*). On appeal, we affirmed the denial of relief on four of the claims, but remanded the remaining two claims to the postconviction court for additional findings. *Id.* at 249-50. On remand, the postconviction court again denied Dukes' petition, and we affirmed on appeal. *Dukes v. State*, 660 N.W.2d 804.807 (Minn. 2003) (*Dukes III*). After the Supreme Court's decision

in *Crawford v. Washington*, 541 U.S. 36 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), Dukes filed a second petition for postconviction relief alleging he was entitled to relief under *Crawford* based on the admission at trial of the transcript of his codefendant's statements. The postconviction court denied relief, and this appeal followed.

[1] "Review of a postconviction proceeding is limited to determining 'whether there is sufficient evidence to sustain the postconviction court's findings, and a postconviction court's decision will not be disturbed absent an abuse of discretion.'" *Zenanko v. State*. 688 N.W.2d 861, 864 (Minn. 2004) (quoting *Sanders v. State*, 628 N.W.2d 597, 600 (Minn. 2001)). When making this determination, we are not limited to the reasoning of the postconviction court, and we can affirm the denial of *922 postconviction relief on grounds other than those on which the postconviction court relied. *See Hummel v. State*, 617 N.W.2d 561, 563 (Minn. 2000); *see also Black v. State*, 560 N.W.2d 83, 85 (Minn. 1997).

Whether Dukes is entitled to have the rule in *Crawford* retroactively applied to his case is governed by the framework of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See State v. Houston*, 702 N.W.2d 268, 270 (Minn. 2005). Under *Teague*, a new rule of federal constitutional criminal procedure is usually not retroactively applicable to a defendant's case once the defendant's case has become final. 489 U.S. at 310, 109 S.Ct. 1060 (plurality opinion). An exception to *Teague's* rule, which is "known as the 'watershed rule' exception, applies when the new rule 'requires the observance of those procedures that * * * are implicit in the concept of ordered liberty' or 'alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of any particular conviction.'" *Houston*, 702 N.W.2d at 270-71 (omission in original) (quoting *Teague*, 489 U.S. at 311, 109 S.Ct. 1060).

[2] As Dukes concedes, his case was final at the time *Crawford* was announced.FN1 Dukes argues that *Crawford* applies retroactively to his case because: (1) *Crawford* did not announce a "new" rule and, alternatively, (2) that *Crawford* established a "watershed rule" of criminal procedure and therefore is fully retroactive under an exception to *Teague's* general rule. The state urges us to adopt the reasoning of federal circuit courts that have held, pursuant to *Teague*, that *Crawford* is not retroactively applicable to cases final at the time *Crawford* was decided.

> FN1. "A case is final when a 'judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari [has been filed and] finally denied.'" *O'Meara v. State*, 679 N.W.2d 334 339 (Minn. 2004) (alterations in original) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S Ct. 708, 93 L.Ed.2d 649 (1987)).

We have already decided in *Danforth v. State* 718 N W 2d 451 (Minn. 2006), that *Crawford* announced a new rule, the rule is not a "watershed rule" of federal constitutional criminal procedure and, consequently, the rule is not retroactive to cases that were final at the time of the *Crawford* decision. Because Dukes' case was final at the time of the *Crawford* decision, he is not entitled to retroactive application of *Crawford* to his case and the postconviction court did not abuse its discretion in denying Dukes' petition for relief.

Affirmed.
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October Term, 2006

Derrick Ramon Dukes,
Petitioner,
Vs.
State of Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should *Crawford v. Washington* apply to an already final 1994 state murder case where the defendant raised a Confrontation Clause challenge in his direct appeal but did not seek a writ of certiorari, did not seek habeas corpus relief, did not raise a Confrontation Clause claim in his first petition for a writ of certiorari but did claim denial of his Sixth Amendment right to effective assistance of counsel, and where any error was harmless?

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OPINIONS BELOW

1. *State v. Dukes*, 544 N.W.2d 13 (Minn. 1996). The Minnesota Supreme Court affirmed Petitioner's conviction on direct appeal, holding in part that the conviction did not violate his Sixth Amendment right to confrontation. Petitioner did not seek a writ of certiorari.

2. *Dukes v. State*, 621 N.W.2d 246 (Minn. 2001). The Minnesota Supreme Court ruled that Petitioner's Sixth Amendment Confrontation Clause claim was procedurally barred, but remanded the case for a further hearing on other issues, including an ineffective assistance of counsel claim. Petitioner did not seek a writ of certiorari to challenge the Confrontation Clause ruling.

3. *Dukes v. State*, 660 N.W.2d 804 (Minn. 2003). The Minnesota Supreme Court affirmed the denial of post conviction relief after additional hearing for a claim of ineffective assistance of counsel. The petition for a writ of certiorari was denied. *Dukes v. Minnesota*, 124 S.Ct. 1069 (2004).

4. *Dukes v. State*, 718 N.W.2d 920 (Minn. 2006). The Minnesota Supreme Court affirmed the denial of Petitioner's *Crawford v. Washington* claim, holding that the decision is not retroactive to cases that were already final. Petitioner seeks review of this decision.

JURISDICTION

Petitioner invokes the jurisdiction of this Court to review the final judgment of the highest state court to rule on his case, pursuant to Title 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION

Petitioner alleges that his Sixth Amendment right to Confrontation was violated at trial in 1994.

STATEMENT OF THE CASE

Petitioner Derrick Ramon Dukes was found guilty by a state court jury in 1994 of first degree murder in violation of Minnesota Statutes § 609.185 for aiding and abetting the murder of Joseph McKinney, and of attempted first degree murder of Bennie Chaney. He was sentenced to life in prison for the murder conviction and to a consecutive term of 180 months for the attempted murder conviction.

The license number of the car used to transport Petitioner and his co-defendants from Minneapolis to St. Paul was traced. Petitioner was identified as the owner of the car. The murder weapon was found in Petitioner's jacket pocket. Bennie Chaney identified Petitioner at trial as one of the men who attacked him.

Petitioner's co-defendant Kevin Lewis tendered a guilty plea in return for a promise for a reduced sentence, but with the stipulation that he would not receive the reduced sentence unless he testified against his co-defendants at their trials. He refused, however, to testify at Petitioner's trial and the agreement was revoked. Lewis was separately tried and convicted of the same crimes. *See, State v. Lewis*, 547 N.W.2d 360 (Minn. 1996).

The transcript of Lewis's tendered guilty plea was offered against Petitioner as a statement against Lewis's penal interest. Rather than seeking redaction of the transcript pursuant to *Williamson v. United States*, 512 U.S. 594, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) after the trial court ruled that portions would be admissible, Petitioner's attorney asked that the entire transcript be admitted. Petitioner offered another inculpatory statement by Lewis that differed from the guilty plea transcript so that Petitioner could argue that Petitioner was only marginally involved and that Lewis was not entitled to belief.

The Minnesota Supreme Court affirmed Petitioner's conviction on direct appeal, holding that admission of the transcript of Lewis's guilty plea—which inculpated Petitioner—did not violate Petitioner's right to Confrontation as explained in *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597 (1980). Their ruling is at *State v. Dukes*, 544 N.W.2d 13, 19 (Minn. 1996).

Petitioner did not seek a writ of certiorari to challenge the Minnesota Supreme Court ruling that

admission of Lewis's guilty plea transcript was not a violation of Petitioner's right to Confrontation under the Sixth Amendment. Petitioner has never sought a writ of habeas corpus to raise the claim in Federal Court, and would be time-barred from doing so. Petitioner's conviction was final no later than May 17, 1996.

Three years later, in 1999, Petitioner filed a state-court petition for post conviction relief that included six claims, including that he was denied his right to Confrontation under the Sixth Amendment by the admission at trial of the transcript of Lewis's guilty plea. *See, Dukes v. State*, 621 N.W.2d 246, 250 (Minn. 2001). The District Court found that Petitioner had already raised the Confrontation Clause claim on direct appeal and therefore was procedurally barred from raising it in a subsequent post conviction proceeding. The Minnesota Supreme Court affirmed the ruling that the Confrontation Clause claim was procedurally barred. *Id.* at 251.

Petitioner did not seek review of the decision of the Minnesota Supreme Court that his Confrontation Clause claim was procedurally barred. In the same decision, however, the Minnesota Supreme Court remanded the case to the District Court for further findings on two other issues. After the District Court again denied relief the Minnesota Supreme Court again affirmed. *Dukes v. State*, 660 N.W.2d 804 (Minn. 2003).

Petitioner sought a writ of certiorari to review the decision of the Minnesota Supreme Court that he

had not been denied his Sixth Amendment right to the effective assistance of counsel at trial, but did not attempt to seek review that his Confrontation Clause claim was procedurally barred. The petition for a writ of certiorari was denied. *Dukes v. Minnesota*, 124 S.Ct. 1069 (2004).

Petitioner again sought state-court post conviction relief after this Court's decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The District Court denied relief, and the Minnesota Supreme Court affirmed, holding that Petitioner was not entitled to retroactive application of the decision to his Confrontation Clause claim because Petitioner's conviction was already final at the time of the decision. *Dukes v. State*, 718 N.W.2d 920, 922 (Minn. 2006). Petitioner seeks review of this decision.

REASONS FOR DENYING THE PETITION

Petitioner Derrick Ramon Dukes seeks retroactive application of this Court's 2004 Sixth Amendment Confrontation Clause ruling in *Crawford v. Washington* to overturn his 1994 state-court murder conviction even though the conviction was final no later than 1996 and even though Petitioner did not seek every possible avenue to have this Court or any other Federal Court review the state Supreme Court decision that held that his Confrontation Clause rights were not violated under the law as understood at the time.

Petitioner has not attempted to show that there was any "cause" that prevented him from pursuing his Confrontation Clause claim, and he makes no allegation that he is actually innocent of the murder and the attempted murder. The petition for a writ of certiorari should be denied.

Petitioner claimed at trial and on direct appeal that the admission of a transcript of the inculpatory portions of the guilty plea of his non-testifying co-defendant Kevin Lewis violated his right to Confrontation under the Sixth Amendment. *State v. Dukes*, 544 N.W.2d 13 (Minn. 1996). But Petitioner did not pursue that claim by seeking a writ of certiorari from this Court after his conviction was affirmed by the Minnesota Supreme Court, and did not seek to raise the claim by collateral habeas corpus attack in Federal Court. Petitioner's conviction was final no later than May 17, 1996.

Petitioner also raised a Confrontation Clause claim in his first state-court petition for post conviction relief, in 1999. But Petitioner did not seek a writ of certiorari when the Minnesota Supreme Court held that the claim was procedurally defaulted because already raised and decided on direct appeal. Nor did Petitioner seek review of that decision when he sought a writ of certiorari to review the denial of his other Sixth Amendment claim, that he had been denied effective assistance of counsel.

Petitioner may not now seek habeas corpus relief. More than one year has passed since his conviction became final. Because Petitioner failed to

pursue the Confrontation Clause claim that he now raises, he would not be allowed to raise the claim in a habeas corpus proceeding unless he demonstrated both cause for his failure to raise the issue and actual prejudice. *Bousley v. United States*, 523 U.S.614, 622, 118 S.Ct. 1604, 1611, 140 L.Ed.2d 828 (1998), *citing Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 2643-44, 91 L.Ed.2d 397 (1986).

A Petitioner may establish "cause" for failure to raise a claim and avoid the consequences of procedural default if the claim "is so novel that its legal basis is not reasonably available to counsel." *Bousley v. United States*, *supra*, at 622, 1611. But there is nothing novel in the idea that a criminal defendant must have the right to cross-examine the witnesses whose testimony is used to establish the defendant's guilt. Petitioner has not shown any cause for failure to seek a writ of certiorari after the first Minnesota Supreme Court decision that his Sixth Amendment right to Confrontation was not violated.

Petitioner has not attempted to claim that he is actually innocent of the crimes for which he was convicted. A procedural default may be excused in a habeas proceeding if the petitioner can establish that he was "actually innocent" of the crimes. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), *citing Murray v. Carrier, supra.* Petitioner cannot establish a claim of actual innocence in this case, where he was identified at the scene as one of the three perpetrators of the offense, he owned the car used to transport the perpetrators to the scene of the crimes, and the murder weapon was found in his

pocket. Any error in admitting the transcript of Lewis's guilty plea—not redacted at Petitioner's request—was harmless.

Petitioner may not seek habeas corpus relief from his conviction because he did not seek to do so in a timely manner. The Minnesota Supreme Court held, in the appeal from the first denial of state-court post conviction relief, that Petitioner is not entitled to raise a Confrontation Clause challenge because the claim was already raised and decided in the direct appeal. That final judgment on that issue was not open for renewed consideration.

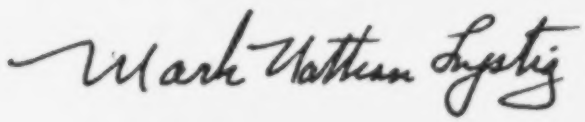
Petitioner's conviction was final in 1996, and he did not seek review of his conviction by petition for a writ of certiorari after his Confrontation Clause claim was denied by the Minnesota Supreme Court. The current petition for a writ of certiorari should be denied because Petitioner has procedurally defaulted his right to raise the claim, and has made no showing that he is actually innocent of the crimes such that the ruling in *Crawford v. Washington* should be applied to his final judgment.

CONCLUSION

Petitioner Derrick Ramon Dukes did not pursue a Confrontation Clause claim by petition for a writ of certiorari or petition for Federal habeas corpus after his conviction was affirmed by the Minnesota Supreme Court in 1996. Because he has not established either cause for failing to pursue the claim or that he is actually innocent of the crimes, the rule in *Crawford v. Washington* should not be retroactively applied to his case. His conviction is final. That finality should not be disturbed.

Dated: 1-29-07

Respectfully submitted;



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No. 06-628

In the Supreme Court of the United States

Derrick Ramon Dukes,

Petitioner,

v.

State of Minnesota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

The State of Minnesota, for the first time, raises the issue of procedural default in its brief in opposition. This new point provides no basis to deny the petition for a writ of certiorari as the state has waived this argument and as petitioner has not procedurally defaulted his Sixth Amendment Confrontation Clause claim.

The state did not assert the defense of procedural default when it responded to Dukes' petition for post-conviction relief in the state district court or at the Minnesota Supreme Court. The state waived its procedural default defense by failing to raise it before the Minnesota state courts. See *Franklin v. Johnson*, 290 F.3d 1223, 1229 (9th Cir. 2002); *Chaker v. Crogan*, 428 F.3d 1215, 1220 (9th Cir. 2005).

The state may also not avail itself of this defense as there has been no procedural default of Dukes' claim that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d. 177 (2004); should be applied retroactively. The case comes before the United States Supreme Court upon Dukes' petition for a writ of certiorari from the Minnesota Supreme Court's decision affirming the denial of Dukes' Petition for Post-Conviction Relief under Minnesota Statute § 590.01. See *Dukes v. State*, 718 N.W.2d. 920 (Minn. 2006). Dukes is not procedurally barred from raising a claim of *Crawford* error in a Petition for Post-Conviction Relief under Minnesota Statute § 590.01 where the claim was not available at the time of his direct appeal. *Jihad v State of Minnesota,* 714 N.W.2d 445,448 (Minn. 2006).

The procedural default defense also does not apply here as Dukes did raise his Confrontation Clause claim at his

initial trial and on direct appeal. *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); and *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); are both distinguishable. In both cases the respective petitioners failed to raise the claims upon which they sought post-conviction relief on direct appeal. Such failures in each case resulted in this Court's finding procedural default. *Bousley*, 523 U.S. at 621, 118 S.Ct. at 1610; *Murray*, 477 U.S. at 489, 106 S.Ct. at 2646.

In contrast, Dukes raised his Sixth Amendment Confrontation Clause claim at trial *and* in his direct appeal to the Minnesota Supreme Court. *State v. Dukes*, 544 N.W. 2d 13 (Minn. 1996). Dukes therefore did not procedurally default on his Sixth Amendment claim having specifically raised it on direct appeal. *Barnabei v. Angelone*, 214 F.3d. 463, 472 (4th Cir. 2000) (abrogated on other grounds, *Bell v. Jarvis*, 236 F.3d. 149 (4th Cir. 2000).

Finally, the specific claim now raised by the petitioner is that *Crawford v. Washington*, supra, should be applied retroactively. Petitioner could not have procedurally defaulted on this claim as it was not available until 2004, well after his conviction became final.

CONCLUSION

The State of Minnesota can not now avail itself of a procedural default defense where it failed to raise this claim before the Minnesota state courts. Moreover, even if the claim were properly made, Dukes has not procedurally defaulted his claim that *Crawford v. Washington* should be applied retroactively. This claim is properly made in Dukes' petition for post-conviction relief under Minnesota Statute § 590.01. Dukes also raised his Sixth Amendment Confrontation Clause claim on direct appeal and therefore did not procedurally default such claim. The state's reasons for denying Dukes' petition for a writ of certiorari are therefore without merit. Dukes asks that his writ be granted for the reasons stated in his petition.

Dated this 16th day of February, 2007.

Respectfully submitted,

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